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No. 03-44

In The Supreme Court of the United States

BASIM OMAR SABRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") submits this *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed in this case by Basim Omar Sabri.[1] The NACDL is a nonprofit corporation with more than 10,000 lawyer-members and 28,000 affiliate-members in all 50 States. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice and to ensuring that criminal statutes are applied in accord with the United States Constitution. In furtherance of this and its other objectives,[2] the NACDL files approximately 35 *amicus*

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[1] The parties have consented to the submission of this *amicus curiae* brief, and their letters of consent have been filed with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus curiae*, its members, or its counsel contributed money or services to the preparation or submission of this brief. *See* S. Ct. Rule 37.6.

[2] More information about the NACDL, its work, and its mission is available at http://www.nacdl.org.

curiae briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

This case involves the interpretation, and the constitutional validity, of a relatively novel but increasingly employed federal criminal statute, 18 U.S.C. § 666,[3] that has engendered fierce debate about some of the "oldest questions" of constitutional law. *See* New York v. United States, 505 U.S. 144, 149 (1992) ("The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.").

STATEMENT OF THE CASE

The relevant facts of this case, as well as its procedural history, are set out clearly and completely in Mr. Sabri's Petition, in the Appendix to that Petition, and in the opinions of the courts below. *See United States v. Sabri,* 183 F. Supp. 2d 1145 (D. Minn. 2002), *rev'd,* 326 F.3d 937 (8th Cir. 2003). For purposes of this *amicus curiae* brief, it is sufficient to emphasize at the outset that both the District Court and the Court of Appeals below concluded explicitly that Section 666 cannot be justified constitutionally as a spending condition within the meaning of *South Dakota v. Dole,* 483 U.S. 203 (1987). *See Sabri,* 183 F. Supp. 2d at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause."); *Sabri,* 326 F.3d at 947-48 ("[W]e conclude that [Section] 666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all."). The Court of Appeals concluded, however, that Section 666 is nonetheless "a law necessary and proper to the execution of Congress's Spending Power." *Sabri,* 326 F.3d at 950.

Thus, this case squarely and cleanly presents for this Court's review a question of statutory interpretation that is clear and straightforward but at the same time implicates "first principles" of our constitutional federalism. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

However, the reading of the statute endorsed by the Court of Appeals below is incongruent with Congress's purpose and threatens to disrupt the Constitution's "delicate balance" between state and federal power. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1992). The spending power enjoyed by Congress under Article I does

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[3] Section 666 — sometimes characterized as the "the Beast in the Federal Criminal Arsenal" and "the Stealth Statute" — makes run-of-the-mill bribery a federal crime if the bribe relates to a transaction worth more than $5,000 and involves the agent of any organization or government that receives "in any one year period[] benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b). *See generally* Fischer v. United States, 529 U.S. 667 (2000); Salinas v. United States, 522 U.S. 52 (1997); George D. Brown, *Stealth Statute: Corruption, The Spending Power, and the Rise of Section 666*, 73 NOTRE DAME L. REV. 247 (1998); Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

not permit the federal government to nationalize all local bribery prosecutions absent *some* connection with the integrity of a federal program. *Cf. Lopez*, 514 U.S. at 563 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). Section 666 should be read to avoid such a result; otherwise – as we discuss in more detail below – it should be invalidated.[4]

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[4] *Amicus* notes that a petition for a writ of certiorari is also pending in *Krilich v. United States*, 257 F.3d 689 (7th Cir. 2001), *cert. pending* __ U.S.L.W. ____ (U.S. June 26, 2003) (No. 02-1445). *Krilich* presents the question of whether the 18 U.S.C. § 1014 criminalizes the making of false statements to federally insured institutions, even when those statements are unrelated to any particular lending transactions. Section 1014, dealing with "loan and credit applications," makes it a crime to "knowingly make[] any false statement * * * for the purpose of influencing in any way * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation." The Seventh Circuit held that Section 1014 applies to "transactions other than loans" or other extensions of credit. In effect, this holding extends Section 1014 to cover *any* false statement, regardless of context or subject, to a banking institution. In other words – and like the interpretation of Section 666 embraced by the court below in this case – the Seventh Circuit's broad interpretation of Section 1014 expands the number of transactions covered by the statute far beyond the lending activities that are likely to effect federal funds.

Amicus believes that Mr. Sabri's case and *Krilich* present similar questions of similar constitutional and administrative import. In the interpretation of both statutes, this Court is asked to decide whether or not – in the context of a criminal statute grounded upon Congress's Spending Power – the government must establish a clear nexus between the offense conduct and its effect on federal funds.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION ON WHICH THE COURTS OF APPEALS ARE CLEARLY AND DEEPLY DIVIDED

NACDL fully endorses the Petitioner's observation that "[t]his case presents a recurring question of fundamental importance to the relationship between the states and the federal government which this Court previously left open and which has intractably divided the courts of appeals," Pet. at 2, and also the claim that "[t]his case presents an ideal vehicle to resolve [this] conflict," *id.* at 11.

Section 666 is an important and increasingly deployed weapon in federal prosecutors' anti-corruption arsenal. As Professor Brown reports, in a just-published study:

> [p]rosecuting state and local corruption is an important activity of the Department of Justice. Between 1981 and 2000, 1,704 state officials were indicted on corruption offenses, 1,462 were convicted, and 554 were awaiting trial at the end of 2000. The twenty-year totals for local officials were as

follows: 4,968 were indicted, 4,233 were convicted, and 1,735 were awaiting trial as of the end of the year.[5]

Commenting particularly on Section 666, Professor Brown notes that "[t]his surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption."[6] The increasingly important role played by this statute makes it all the more important that this Court provide prosecutors, defense counsel, and courts alike with a definitive interpretation of its elements and identification of its requirements.[7]

The Question Presented here is all the more significant in light of its implications for the ongoing debate concerning the dangers the federalization of crime poses to the administration of federal criminal justice and "first principles" of constitutional federalism.[8] In the words of one District Court, this case, and the Question Presented, "raise[] the question of how far Congress has

[5] George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003).

[6] *Id.* at 504.

[7] By 1990, there were only nine published opinions discussing the provision. Since then, use of the statute has increased dramatically. *See* Rosenstein, *The Beast in the Federal Arsenal, supra,* at 690 & n. 152.

[8] *See generally* Chief Justice William H. Rehnquist, *Report to Congress* (Jan. 1, 1999) (noting that the over-federalization of crime "threatens to change entirely the nature of our federal system[.]"),

gone, and, under the Constitution, may go, to federalize crime."[9] In a similar vein, the American Bar Association has called for a "principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."[10]

[9] *United States v. McCormack*, 31 F. Supp. 2d 176, 177 (D. Mass. 1998). Even a brief survey of the reported cases involving Section 666 prosecutions reveals shows that the statute's use threatens the federal-state balance that is particularly important in the criminal-law context, and has often reached garden-variety local corruption where there is no meaningful connection to a federal interest. *See, e.g., United States v. Grossi*, 143 F.3d 348 (7th Cir. 1998) (town supervisor demanded and received bribes for, *e.g.*, administering local general-assistance program funds to compensate doctors for unpaid bills); *United States v. DeLaurentis*, 230 F.3d 659 (3rd Cir. 2000) (supervisor of police detectives, in return for bribes, interceded with town council to keep a bar open, thereby necessitating disproportionate allocation of police manpower to the detriment of street patrols elsewhere); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989) (contractor sold pipe to counties and gave kickbacks to county officials who granted contracts); *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993) (county executive received bribes in connection with civic-center project and automobile purchases); *United States v. Lipscomb*, 299 F.3d 303 (5th Cir. 2002) (city council member accepted bribes from taxicab company owner); *United States v. Ferrara* 990 F.Supp. 146 (E.D.N.Y. 1998) (defendant charged with bribing town board in exchange for change in zoning to allow construction of radio tower); *United States v. Smith*, 659 F.Supp. 833 (S.D.Miss. 1987) (county supervisor charged with accepting bribes in connection with purchase of culverts and grader blades).

[10] ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 56 (1998).

In that context, the Court of Appeals' broad reading of Section 666 is untethered to a federal interest in particular federal projects or programs, and should therefore trigger the established canon of construction that statutes be read so as to eliminate constitutional doubts.[11] Indeed, as Professor Brown has observed, the relevant legislative history "support[s] the interpretation that Congress intended to deal with a relatively narrow problem, [namely,] specified forms of malfeasance in connection with the administration of federal assistance."[12]

II.

COURTS AND COMMENTATORS ARE DIVIDED ON THE QUESTION WHETHER AND HOW CONGRESS'S SPENDING POWER AUTHORIZES SECTION 666 AND ITS APPLICATIONS

The Question Presented in this case involves more than a technical disagreement among courts about the correct reading of statutory text; it concerns also a fundamental and pressing matter of constitutional law.

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[11] *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[12] Brown, *Stealth Statute, supra,* at 280 (1998). Congress's purpose for enacting Section 666 was "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies[.]" S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

As the court below observed, "it is axiomatic that '[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.' *United States v. Morrison,* 529 U.S. 598, 607 (2000)." *Sabri,* 326 F.3d at 945. Accordingly, courts and commentators have frequently observed that the constitutional authorization for Section 666 is Congress's "Spending Power" – *i.e.,* its power to "provide for the . . . general Welfare of the United States."[13] It is not at all clear, however, how, whether, and to what extent the Spending Power authorizes the creation, prosecution, and punishment of federal crimes. As Professor Engdahl has (colorfully) put it:

> [f]unds recipients are not protectorates of the federal government[.] . . . The

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[13] U.S. CONST. art. I, § 8, cl. 1. *See, e.g., Fischer,* 529 U.S. at 689 n.3 ("Section 666 was adopted pursuant to Congress' Spending Power, Art. I, § 8, cl. 1.") (Thomas, J., dissenting); *United States v. Phillips*, 219 F.3d 404, 414 (5th Cir. 2000) ("Congress' authority to enact Section 666 rests on the Spending Clause of the Constitution."); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Every court that has addressed the issue has concluded that Congress adopted Section 666 pursuant to its Spending Clause power."); *United States v. McCormack*, 31 F. Supp. 2d 176, 186 n.18 (D. Mass. 1998) ("Courts have held that section 666 was passed pursuant to Congress' tax and spending power as set forth in Article I, Section 8."); Brown, *Stealth Statute, supra*, at 262; David E. Engdahl, *The Spending Power*, 44 DUKE L. J. 1, 92 (1994) (asserting that Section 666 and similar provisions "lack any basis in the Constitution" and that "Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else").

> Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog. Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property.[14]

The courts clearly and sharply disagree whether Section 666 should be evaluated, and can be justified, using this Court's conditional-spending precedents. It is, of course, settled law that Congress may spend money on projects and in pursuit of ends that are neither mentioned nor authorized explicitly in Article I, and also may enthusiastically promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends.[15] Thus, even as this Court has often in recent years addressed the outer boundaries of federal power, Congress's ability to regulate

[14] Engdahl, *The Spending Power, supra,* at 92.

[15] *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution[,]" and so "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.") (citation and quotation marks omitted).

broadly through conditional spending, *i.e.*, its power to regulate via contract,[16] has not been questioned.[17]

It is far from clear, though, that a federal criminal statute imposing liability on third parties (*i.e.*, on parties other than the federal government's actual "contracting" partners) can helpfully or coherently be considered a regulatory condition within the meaning of this Court's conditional-spending caselaw. Again, as Professor Engdahl has put it, "it cannot be sufficient to give constitutional competence to Congress that the deed sought to be punished is done against one to whom Congress has extended financial aid."[18]

[16] *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

[17] *See Printz v. United States,* 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) ("[The Court's] holding . . . does not spell the end of the objectives of the Brady Act . . . [because] Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."); *Alden v. Maine*, 527 U.S. 706, 755 (1999) (citing *Dole*, and observing that the Federal Government does not "lack the authority or means to seek the States' voluntary consent to private suits"). *See also* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by . . . delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

[18] Engdahl, *The Spending Power, supra,* at 92.

This Court has not yet had occasion to consider the applicability of *South Dakota v. Dole* and its conditional-spending progeny to a challenge to the constitutional validity of a federal criminal statute or its application. It would seem, though – given "first principles" of federalism and the restrictions on conditional spending set out in *Dole*, 483 U.S. at 206-208 – that at least some applications of Section 666 will be difficult to justify under the conditional-spending doctrine.

Otherwise, "the spending power could render academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992). Indeed, this Court's *Salinas* opinion – although it clearly assumed that Section 666 is a constitutionally valid enactment – acknowledged the possibility that the Constitution limits the use of Section 666 in cases not implicating the integrity of federal programs and funds.[19]

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[19] *Salinas*, 522 U.S. at 59 (leaving open the question whether Section 666 requires some "connection between a bribe and the expenditure of federal funds"); *id.* at 61 ("Whatever might be said about [the statute's] application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds."). *See also United States v. Santopietro*, 166 F.3d 88, 93 (1999) ("*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is necessary to assure that the statute is not unconstitutionally applied."); *United States v. LaHue*, 998 F. Supp. 1182, 1190 (D. Kan. 1998) ("The Supreme Court [in *Salinas*] most certainly was not implying that section 666(b)'s jurisdictional clause should be read any more broadly than its language and purpose

It should be emphasized, though, that while some courts have embraced the view that Section 666 is a conditional-spending measure, to be analyzed and controlled using *Dole*,[20] others have concluded – as the Eighth Circuit concluded in this case – that

> [Section] 666 cannot be sustained as a condition attached to the receipt of federal funds because this statute is not a conditions statute at all. Section 666 is merely a general criminal statute which directly regulates the conduct of persons who are not parties to the funding 'contract.'

Sabri, 326 F.3d at 945-948.[21]

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permit."); *United States v. Roberts*, 28 F. Supp. 2d 741, 745 (E.D.N.Y. 1998) ("*Salinas* . . . did not foreclose the possibility that there is an outer boundary beyond which the relationship between the bribe and the expenditure of federal funds is too remote to support § 666 jurisdiction.").

[20] *McCormack*, 31 F. Supp. 2d at 177; *United States v. Zwick*, 99 F.3d 672, 687 (3d Cir. 1999) (following *McCormack* observing that "[a]pplying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause"); *Lipscomb*, 299 F.3d at 321 ("although we may debate whether the [§] 666 peg fits the conditional-grant hole, I shall test it under the four prongs of *Dole*.").

[21] *See also, e.g.*, Brown, *Stealth Statute, supra*, at 294–99 (suggesting *Dole* be used in Section 666 cases); *Sabri*, 183 F. Supp. 2d at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as

The Court below posited that the Spending Power might also justify Section 666 even if Section 666 is not properly regarded as a regulatory condition attached to federal program funds. As Judge Hansen put it below,

> the Spending Power and the Necessary and Proper Clause are contained in section 8 of the first Article, and the Necessary and Proper Clause applies to the spending power, enabling Congress to enact all laws which are convenient to the exercise of disbursing federal funds."

Sabri, 326 F.3d at 947.

In Judge Hansen's view, which is shared by other coourts,[22] "it is an incontestable proposition that the

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a valid exercise of Congress's power under the Spending Clause.").

[22] *See, e.g., United States v. Edgar,* 304 F.3d 1320, 1325 (11th Cir. 2002) ("We are persuaded that a basis for the enactment of [Section] 666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power."); *Bynum*, 327 F.3d at 991; *United States v. Bigler,* 907 F. Supp. 401, 402 (S.D. Fla. 1995) ("Article I, § 8 gives Congress the power to 'provide for the ... general Welfare.' "); *Lipscomb,* 299 F.3d at 318 (opinion of Wiener, J.) ("My solo review here will focus on whether § 666 is necessary and proper to the spending power . . . ."). *See also* Brown, *Stealth Statute, supra,* at 266 ("One might assume that the role of the statute is to protect the federal funds that trigger its application. If this were the case, § 666 would simply be a law 'necessary and proper for carrying into [e]xecution' the power to spend the money in the first place, that is,

disbursement of federal funds to subnational agencies to advance the general welfare is a legitimate end within the scope of the Constitution. We further quickly conclude that Congress also has a legitimate right to protect these disbursements from misappropriation once made." *Ibid.*

However, the contrary view also has vociferous proponents, including judges and commentators. In particular, Judge Smith, of the Fifth Circuit, has observed:

> the government's argument that no connection need be shown between federal funds or programs and the local corruption prosecuted under [Section] 666 confuses a connection to a federal interest in federally-funded programs with the federal government's generalized interest in everything that occurs within its borders. . . . Such an analysis turns the accepted understanding of the Necessary and Proper Clause on its head and, in effect, asserts that because Congress may pursue the general welfare through the Spending Clause, all laws that are necessary and proper to the general welfare must be considered constitutional under the Spending Clause. This argument, if

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the power to provide for the general welfare, generally referred to as the spending power."); *id.* at 291 ("Congress has the power to spend the funds that constitute the federal assistance. It can take the steps necessary and proper to protect those funds.").

> followed, would overturn the accepted meaning of the Spending and the General Welfare Clauses that has existed for nearly two centuries.[23]

Similarly, below, Judge Bye of the Eighth Circuit pointed out that, even conceding the "received wisdom" that "Congress enjoys broad powers to select the means of enacting its objectives," Section 666 nevertheless represents an unauthorized exercise of congressional power because it so "upsets the delicate balance between federal and state authority" that it cannot be regarded as constitutionally "proper."[24] In addition, the leading academic authority on Section 666 has expressed similar concerns, cautioning that "[t]aken to its limits, the combination of the spending power with the Necessary and Proper Clause could exceed" constitutional limits.[25]

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[23] *Lipscomb, supra* at 373-74 (opinion of Smith, J.) (footnote omitted).

[24] *Sabri,* 326 F.3d at 956 (Bye, J., dissenting). *See also* United States v. Morgan, 230 F.3d 1067, 1071 (8th Cir. 2000) (Bye, J., specially concurring).

[25] Brown, *New Federalism's Unanswered Question, supra*, at 510. It should be noted here that one of the counsel for *amicus curiae* advances, in an upcoming law review article, the argument that the Necessary and Proper Clause does not provide a sufficient constitutional basis for Section 666. Richard W. Garnett, *Federal Criminal Law, the Spending Power, and the New Federalism,* 89 CORNELL L. REV. ___ (forthcoming 2003).

It should also be noted that there is a rich, provocative, and growing literature devoted to the Necessary and Proper Clause, and that several leading scholars have contended that the Necessary and

Under current doctrine, the Spending Power permits Congress to promote, through spending, the general welfare as it understands it, without being subject to meaningful judicial review. Add to that mix, though, the claim that the Sweeping Clause authorizes direct regulation – even regulation not explicitly authorized elsewhere in Article I – so long as that regulation is rationally related to a federal "interest" in the unlimited goals and preferences it is permitted to promote through spending, and it is difficult, if not impossible, to see how the resulting federal regulatory power is anything but limitless.

That cannot constitute a correct statement of Congressional authority. It would be, to say the least, "strange if a 'proper' executory law – a law that is distinctively and peculiarly within the jurisdiction of the

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Proper Clause, correctly understood, imposes more demanding obligations on federal legislators than is sometimes supposed. *See, e.g.,* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Randy E. Barnett, *The Original Meaning of the Necessary & Proper Clause*, 6 U. PA. J. CONST. L. _____ (forthcoming 2003); J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581 (2002); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998); Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L. J. 267 (1993). And, of course, James Madison famously reminded us that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress." 2 ANNALS OF CONG. 1898 (1791).

national government – could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution."[26]

As former Chief Judge of the Eighth Circuit, Judge Richard S. Arnold, has observed, "[o]ur Constitution is a charter for a federal government of limited powers, and under this charter the States possess primary authority for defining and enforcing the criminal law." *United States v. Delpit*, 94 F.3d 1134, 1149 (8th Cir. 1996) (internal quotation marks and citation omitted).

In the same spirit, this Court has in recent years identified and enforced constitutional limits on Congress' power to expand federal regulatory power and jurisdiction. Still, in light of the federal government's regulatory enthusiasm, Congress can be expected increasingly to turn to the Spending Power to attempt through conditional spending grants what it cannot do directly.

However, such efforts could have grave implications for the federal structure of our Constitution, and for the liberty of individuals. As Justice Kennedy has noted, "the Spending Clause power . . . has the potential to obliterate distinctions between national and local spheres

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[26] Lawson & Granger, *Jurisdictional Interpretation, supra,* at 331; *see also, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231, 1234 (1994) ("[T]he Necessary and Proper Clause, which the founding generation called the Sweeping Clause, [does not] grant general legislative powers to the national government.").

of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting).

While Article I of the Constitution grants Congress an expansive, sweeping power to promote the "general Welfare of the United States," the Constitution also imposes meaningful limits on the federal government's ability to use the spending power as a vehicle for expanding federal criminal jurisdiction over traditional state crimes. These limits – like the Constitution's other "structural" provisions – protect individual liberty in criminal cases by constraining government no less than do the Fourth, Fifth, and Sixth Amendment.

Nothing in Article I authorizes the United States to criminalize bribery merely because the corrupt transaction in question involves an agent of an organization that, somewhere, receives federal-program funds. Nor is this conclusion undermined by the well-established rule that Congress may, in effect, regulate the recipients of such funds, through the attachment to them of conditions. Those prosecuted under Section 666 are not Congress's contracting partners for purposes of conditional-spending doctrine; nor are Section 666 prosecutions of corrupt individuals by the United States obligations to which the recipients of federal-program funds could possibly be said to have agreed. The Sweeping Clause's occasional role as a constitutional catch-all cannot, consistent with "first

principles" of constitutional law, sustain the argument that Section 666 and its uses are valid as "necessary and proper" to the smooth functioning of federal programs aimed at promoting the General Welfare.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in this case should be granted.

Respectfully submitted,

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